

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE ZITZ, II,

Defendant-Appellant.

UNPUBLISHED

November 21, 2000

No. 215304

Wayne Circuit Court

LC No. 97-003955

Before: Jansen, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and arson of a dwelling house, MCL 750.72; MSA 28.267. He was thereafter sentenced to concurrent terms of four to ten years of imprisonment and eight to twenty years of imprisonment, respectively. Defendant appeals as of right and we affirm.

This case arises out of a firebombing of the home of a city of Detroit police officer during the early morning hours of June 28, 1996. The testimony at trial established that the fire was actually set by Mark Vandenabeele and Sean Schultz. Defendant was apparently a lookout while the fire was set and was charged as an aider and abettor. Further, defendant admitted at trial that he was a member of a gang (as were the other two accomplices) that was operating in the Detroit area.

Defendant first argues that the trial court abused its discretion by admitting evidence relating to gang activities because it was irrelevant and overly prejudicial. We review a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Generally, relevant evidence is admissible, unless otherwise proscribed by law, while irrelevant evidence is not admissible. MRE 402. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or the needless presentation of cumulative evidence, as defendant contends here. MRE 403.

Here, the trial court permitted the prosecution to admit evidence of photographs of gang symbols painted in defendant's closet, photographs of defendant's tattoos, and a Detroit police officer's testimony regarding the gang and its symbols. In this case, all three gang-member witnesses testified that the gang wanted revenge against the victim. Thus, defendant's membership in the gang was relevant regarding his purported motive to participate in the offenses. In addition, the gang-related evidence was used to challenge remarks made in defendant's opening statement, in which defense counsel suggested that defendant's membership in the gang was "minimal." Consequently, the gang-related testimony was relevant. MRE 401.

The question here is whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice or was needlessly cumulative. We are not persuaded that the probative value of the evidence was substantially outweighed by the potential for prejudice. As noted above, the evidence was relevant to defendant's motive and his attempts to minimize his membership in the gang. Moreover, the prosecution did not have to present its case in a vacuum, especially where defendant was an aider and abettor rather than one who actually set the fire. Thus, evidence of defendant's motive was even more important. Further, defendant did not concede to being in the gang until the third day of this five-day trial. Accordingly, we conclude that the trial court did not abuse its discretion by admitting the gang-related evidence.

Defendant next argues that the trial court erred in denying defendant's motion to suppress the photographs of his closet because they were obtained in violation of his constitutional right to be free of an unreasonable search and seizure. A trial court's findings of fact regarding a motion to suppress evidence are reviewed for clear error; however, the trial court's ultimate decision is reviewed de novo. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000).

An individual has a constitutional right to be secure against unreasonable searches and seizures pursuant to US Const, Am IV; Const 1963, art 1, § 11. *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). Evidence obtained pursuant to an unconstitutional search or seizure is inadmissible in criminal proceedings. *Id.* at 418. Although a search and seizure without a warrant is generally unreasonable, this rule is subject to several exceptions. *Id.* at 417. The prosecution bears the burden of demonstrating that the police either had a valid search warrant or engaged in proper conduct pursuant to one of these exceptions to the warrant requirement. *Id.* at 418.

One of the exceptions to the requirement that a search warrant be obtained before an individual is subjected to a search is the exigent circumstances exception. *People v Cartwright*, 454 Mich 550, 558-559; 563 NW2d 208 (1996). Our Supreme Court has noted that the exigent circumstances exception applies where the police have probable cause to believe that a crime occurred and that the premises to be searched contain either the perpetrators or evidence of the crime. *Id.* at 559. As a prerequisite for establishing the admissibility of evidence obtained during such a search, the prosecution must also establish that immediate action was necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. *Id.*

In the present case, the arresting officer testified that nobody answered the door when the officers attempted to arrest defendant at his home pursuant to an arrest warrant. The officer

testified that they could hear running in the house, and that several individuals attempted to flee through a side door. The officer testified that, as “shotgun man,” it was his responsibility to ensure the safety of the officers. It was during his search of the house that he observed the gang graffiti in defendant’s closet because the door was either open or missing. In light of our Supreme Court’s decision in *Cartwright*, we believe that the officer was entitled to make a brief protective search of the premises. Thus, his testimony regarding his observations during the search were admissible.

Defendant also challenges the introduction of the photographs of the gang graffiti taken during the arrest. We do not believe the prosecution introduced any evidence indicating that it was reasonable for the police photographer to enter defendant’s bedroom area to photograph the graffiti. Although the arresting officer was free to testify regarding his observations, we believe that the trial court erred by admitting the photographs over objection on this basis.

Nevertheless, preserved, constitutional error in the admission of evidence need not require reversal where the error is harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406, 774; 521 NW2d 538 (1994). Here, there was substantial evidence that defendant bragged about his role in the firebombing and that he had acted as a lookout. Thus, there was ample evidence implicating defendant’s role in the preparation for and participation in the arson. Further, the arresting officer testified regarding his observation of gang graffiti in defendant’s closet. Thus, we find that the evidentiary difference between the arresting officer’s testimony and the introduction of the photographs corroborating his testimony was harmless beyond a reasonable doubt. Accordingly, we conclude that the trial court’s denial of defendant’s motion to suppress the photographs, although erroneous, was harmless error.

Lastly, defendant argues that the trial court abused its discretion by imposing a sentence in excess of the judicial sentencing guidelines. The sentencing guidelines range for arson was eighteen to sixty months and the trial court sentenced defendant to a minimum term of eight years (ninety-six months) of imprisonment.

A trial court may exceed the guidelines range, but must articulate its reasons for departure on the record and on the sentencing information report. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). The key test to determine proportionality is not whether the sentence adheres to the guidelines range, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). Here, the trial court based its deviation from the sentencing guidelines, in pertinent part, on the fact that defendant used violence and attempted to intimidate the victim, a police officer. The trial court noted that defendant’s actions forced the victim to move from his neighborhood—to the detriment of the victim and the neighborhood. The trial court also noted what it characterized as defendant’s leadership role in the gang, as well as defendant’s low likelihood of rehabilitation in light of his belief that he was innocent and a victim. Further, defendant’s bond was revoked because of pretrial misconduct. Under these circumstances, and where the trial court considered factors not accounted for by the guidelines range, defendant’s sentence does not violate the principle of proportionality.

Accordingly, we conclude that the trial court did not abuse its discretion in sentencing defendant to a minimum sentence that exceeded the guidelines range. Defendant’s minimum

term of eight years for the arson conviction is proportionate to the seriousness of the offense and the offender.

Affirmed.

/s/ Kathleen Jansen

/s/ Martin M. Doctoroff